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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

FREDERICK EARL HENDRICKS, Plaintiff and Appellant, v. LOS ANGELES UNIFIED SCHOOL DISTRICT, Defendant and Respondent.	B210431 (Los Angeles County Super. Ct. No. BC357509)

APPEAL from a judgment of the Superior Court of Los Angeles County. David L. Minning, Judge. Affirmed.

Law Offices of Leo James Terrell and Leo James Terrell for Plaintiff and Appellant.

Bergman & Dacey, Inc., Gregory M. Bergman, Michele M. Goldsmith and Mark W. Waterman for Defendant and Respondent.

* * * * * *

Appellant Frederick Earl Hendricks, an African American, sued his employer Los Angeles Unified School District (the district) for racial discrimination and retaliation after he was passed over for promotion to the position of police detective. The district obtained summary judgment, from which appellant now appeals. We find that appellant failed to establish any triable issues of material fact as to his two claims and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Application Process for Police Detective

Appellant began employment with the district's police department in January 1991. In February 2000, he received a notice of unsatisfactory service for the period from January 1997 through July 1999, for reasons that are not clear from the record. In June 2001 he was suspended for 15 days for using his police car for personal matters, engaging in discourteous, abusive and threatening treatment of the public, having one teacher obtain a restraining order against him for stalking, and work-related dishonesty. He was absent from work from January 2002 through May 2004, first on medical leave for approximately one year, and then resigned effective January 2003. Appellant requested reinstatement, and returned to work on May 10, 2004.

Three months later on August 13, 2004, appellant applied for the position of police detective. Education Code section 45272, subdivision (a) and the district's rules for making appointments require vacancies to be filled from applicants on eligibility lists. The district's personnel commission places applicants on the eligibility list in the order of their relative merit as determined by their scores on competitive examinations, including a written test, writing project and oral interviews. (See Ed. Code, § 45272, subd. (a).) All eligible applicants with the same percentage score are placed in the same rank. In accordance with the district's "Rule of Three," appointments must be made from applicants within the first three ranks on an eligibility list who are willing and able to accept the position. When all eligible applicants within the same rank have been selected for appointment to a position, that particular rank is deemed exhausted. The remaining

pool of applicants then available for selection includes those who fall within the top three available ranks.[1]

After passing the competitive examination, appellant and five other candidates were placed on the March 2005 police detective eligibility list, which was set to expire one year later. The candidates were ranked as follows:

Rank 1: Ray D. Jordan (Caucasian);

Rank 2: Jo Anna Fontenette (Caucasian);

Rank 2: Appellant (African American);

Rank 3: Darren E. Foote (Caucasian);

Rank 3: Margarita L. Rios (Hispanic);

Rank 4: Carolyn Reeves (African American).

After rankings were determined, the command staff of 11 members, comprised of lieutenants and deputy chiefs, evaluated the six candidates by examining their personnel files and discussing their strengths and weaknesses during a roundtable discussion. The command staff then made their recommendations to the chief of police, who approved the recommendations. At no point during the evaluation process was the race of an applicant discussed. Three candidates were selected to permanent police detective positions in March 2005—Ray Jordan, Jo Anna Fontenette and Carolyn Reeves. The only person selected for a permanent police detective position at that time who was in a rank lower than appellant's was Carolyn Reeves, who is also African American.

The command staff did not believe appellant was one of the three best candidates due to his (1) prior suspension, (2) recent lengthy absence from active duty, and (3) not

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[1] The district explained the "Rule of Three" in its motion for summary judgment by using the following example: If an eligibility list has seven ranks, selection for the first open position must be made from those applicants whose scores placed them in the first three ranks. Selections for open positions would continue to be made from the top three ranks until all the applicants in one of the ranks had been selected, at which point that rank would be exhausted and rank 4 would become "reachable" for selection. Rank 7 would not become reachable until there were only two open higher ranks. Thus, if ranks 1, 2, 3 and 5 had become exhausted, rank 7 would then become reachable, and any selection would have to be made from ranks 4, 6 or 7 for the next open position.

having any special accomplishments within the district's police department. Appellant was told these were the reasons he was not selected when he inquired in March 2005.

Two other candidates were not selected in March 2005 for permanent police detective positions, Darren Foote and Margarita Rios. Foote was placed in a temporary, substitute position for police detective from March through July 2005, based on the same criteria considered by the command staff in selecting the candidates for the permanent position. In January 2006, Foote was selected for a permanent police detective position from the then-existing 2005 eligibility list, following a second meeting and additional discussion by the command staff.

Rios was appointed as a detective trainee in May 2005. Following that assignment, she was assigned to an officer position in the background unit. Later in 2005, the district posted another opportunity for promotion to police detective and required applications to be submitted by October 10, 2005. Rios applied for this 2006 eligibility list, ranked second, and was selected for a permanent police detective position in 2007. Appellant did not apply for the 2006 eligibility list.

Further Promotional Opportunities

In 2005, appellant took the competitive examination for sergeant and was placed in rank 7. By the time summary judgment was granted here, appellant's rank had not yet been reached under the Rule of Three. Appellant also applied for a senior police officer position and was placed in rank 12. During the initial promotion, 40 open senior police officer positions were filled by officers who ranked higher than appellant. Additionally, in accordance with a personnel commission directive, field training officers (FTOs) were "must places" from the eligibility list as they became reachable, since it was determined that they were already performing the duties of senior police officers. Appellant had never been an FTO. Rank 12 did not become reachable until June 2006. After the reachable FTOs were selected, appellant was then considered along with seven other non-FTO candidates. The command staff determined that the other seven candidates were more qualified than appellant. Appellant was considered for the position of senior police

officer four times before he was ultimately recommended for and accepted the promotion, effective November 5, 2007.

Appellant's Complaints

In May 2005, appellant wrote a letter to Chief of Police Alan Kerstein thanking him for his "open door" policy and stating that he had followed his recommendation to speak to members of the command staff regarding his nonselection for police detective. In August 2005, appellant filed an internal complaint of racial discrimination with the district. The district investigated and informed appellant in writing in December 2005 that it had found insufficient information and witnesses to support his claim of racial discrimination. In the meantime, Larry Manion became the new chief of police and appellant wrote two letters to him in September and October 2005, requesting meetings with him. On October 18, 2005, Chief Manion responded in writing that he was in the process of evaluating appellant's concerns. According to appellant, he did not hear from Chief Manion again.

Appellant filed two complaints of discrimination with the California Department of Fair Employment and Housing (DFEH), first on November 28, 2005, alleging that from March through September 2005 he was not promoted to the position of police detective due to his race. He alleged that he was told he was not promoted because of his previous suspension, break in service, and failure to do anything special, but that he was aware of other female and non-African-American male police officers with suspensions and breaks in service who had nevertheless been promoted. He alleged that he was well qualified for the position of police detective because he had more years as an officer than all the other candidates, and had written an after-school program that was currently being implemented. Appellant received a notice of case closure and a right-to-sue letter in April 2006.

On March 9, 2007, appellant filed his second complaint with the DFEH. The second complaint alleged retaliation and alleged that since the filing of his internal complaint, his original DFEH complaint and his pending lawsuit against the district, the

district had retaliated against him by failing to give him promotional opportunities. The retaliation consisted of terminating the promotional list he was on and creating a new promotional list, denying him promotions to the positions of sergeant and senior police officer, and failing to investigate his internal complaint. Appellant received a notice of case closure and a right-to-sue letter in response to this complaint.

Trial Court Proceedings

Appellant filed a lawsuit against the district in August 2006. His first amended complaint (FAC) filed on April 18, 2007 alleged racial discrimination and retaliation in violation of California's Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.). The FAC alleged that "[o]ther less qualified non-African-American Police Officers that ranked lower than [appellant] were promoted to the position of Police Detective over [appellant]," and that he "was not promoted to the rank of Police Detective because of his race, which is African American."

The district moved for summary judgment, or alternatively for summary adjudication, on the grounds that (1) appellant failed to establish a prima facie case of racial discrimination because there were no circumstances suggesting a discriminatory motive, (2) the district had legitimate, nondiscriminatory reasons for its actions and appellant had no evidence of pretext, (3) appellant had failed to establish a prima facie case of retaliation, (4) the district had legitimate, nonretaliatory reasons for its actions and appellant had no evidence of pretext, and (5) appellant had failed to timely exhaust his administrative remedies as to certain alleged conduct. The evidence submitted by the district in support of its motion included excerpts of appellant's deposition and declarations from eight of the command staff members who evaluated appellant.

Appellant opposed the motion arguing that he had created a triable issue of fact on his discrimination claim and had established a prima facie case of retaliation. Appellant's lengthy evidence in opposition included letters of commendation that had been written on his behalf, awards and certificates he had received, the district's discovery responses, and

numerous deposition transcripts. Appellant filed evidentiary objections to most of the district's declarations. The district also filed objections to certain of appellant's evidence.

Appellant's attorney conceded during oral argument on the summary judgment motion that appellant was not claiming that the selection of the three candidates in March 2005 to the position of permanent police detective, including one African American, was discriminatory. Rather, appellant's claim was that the selection of the two remaining candidates to the "provisional" police detective positions was discriminatory. The court granted the district's motion for summary judgment on the grounds that appellant had failed to produce any evidence establishing a prima facie case of discrimination or retaliation or pretext for the district's legitimate reasons for its actions. Summary judgment was entered in favor of the district and this appeal followed.

DISCUSSION

I. Standard of Review and Burdens of Proof

We review a grant of summary judgment de novo. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.) In doing so, we (1) identify the issues raised by the pleadings since it is these allegations to which the motion must be addressed, (2) determine whether the moving party has negated the claims, and (3) determine whether the opposition to the motion has raised triable issues of material fact. (*AARTS Productions, Inc. v. Crocker National Bank* (1986) 179 Cal.App.3d 1061, 1064–1065.) A grant of summary judgment should be affirmed where no triable issue of material fact exists, and the moving party is entitled to judgment as a matter of law. (*Merrill, supra,* at p. 476; Code Civ. Proc., § 437c, subd. (c).)

In analyzing summary judgment on an employment discrimination claim based on a theory of disparate treatment,[2] California courts have adopted the three-stage burden-

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[2] As explained in *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354 footnote 20, "disparate treatment" is intentional discrimination based on prohibited grounds, whereas "disparate impact" is a theory of discrimination based on a facially neutral employer practice or policy, bearing no manifest relationship to job

shifting analysis of *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 (*McDonnell Douglas*). (See *Guz v. Bechtel National, Inc., supra*, 24 Cal.4th at p. 354.) Thus, the plaintiff has the initial burden of establishing a prima facie case of discrimination. (*Id*. at p. 355.) To do this, "the plaintiff must produce evidence that (1) he was a member of a protected class, (2) he was qualified for the position he sought or was performing competently in the position he held, (3) he suffered an adverse employment action, such as termination, demotion, or denial of an available job, and (4) some other circumstance suggests discriminatory motive." (*Ibid*.) If the plaintiff does so, a presumption of discrimination arises and the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for its action. (*Id*. at pp. 355–356.) If the employer sustains this burden, the presumption of discrimination disappears and the plaintiff then has the burden of proving the proffered justification was a pretext for discrimination. (*Id*. at p. 356.) At all times, the "ultimate burden of persuasion on the issue of actual discrimination remains with the plaintiff." (*Ibid*.)

II. Discrimination

A. Prima Facie Case

With respect to the first two elements of a prima facie case of discrimination, it is undisputed that appellant is African American and that he was qualified for the position of police detective in light of his being placed in a reachable rank on the 2005 eligibility list. As to the third element, it is also undisputed that appellant suffered an adverse employment action in that he was not promoted to the position of police detective. But appellant has framed this third issue somewhat differently in both his written opposition to the summary judgment motion and on appeal. He argues that he was the only candidate on the 2005 eligibility list who was passed over for promotion while everyone else on the list was promoted to either permanent or "provisional" detective.

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requirements, that in fact had a disproportionate adverse effect on members of a protected class. Plaintiff relies on a theory of disparate treatment.

As an initial matter, we note that the "pleadings identify the issues to be considered on a motion for summary judgment." (*Wattenbarger v. Cincinnati Reds, Inc.* (1994) 28 Cal.App.4th 746, 750.) Thus, a defendant need only "present facts to negate each claim as framed by the complaint or to establish a defense." (*Ibid.*; *Williams v. California Physicians' Service* (1999) 72 Cal.App.4th 722, 738.) Similarly, "[e]xhaustion of *administrative* remedies is 'a jurisdictional prerequisite to resort to the courts.'" (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 70.) "'To exhaust his or her administrative remedies as to a particular act made unlawful by the Fair Employment and Housing Act, the claimant must specify *that* act in the administrative complaint, even if the complaint does specify other cognizable wrongful acts. [Citation.]'" (*Okoli v. Lockheed Technical Operations Co.* (1995) 36 Cal.App.4th 1607, 1613.) In addition, to maintain a FEHA action, a plaintiff must file a timely DFEH administrative charge within one year "from the date upon which the alleged unlawful practice" occurred. (Gov. Code, § 12960, subd. (d).)

Appellant ignores the fact that of the three candidates selected in March 2005 for the position of permanent detective, one of the candidates (Carolyn Reeves) is the same race as he. A plaintiff cannot establish racial animus by cherry picking for comparison only those successful candidates whose race differs from his. Nor are we persuaded by appellant's argument that Reeves's appointment is of no significance because she is currently married to Oliver Bartee, an African-American detective who is a longtime veteran of the department. It is undisputed that at the time she applied for the position of police detective, Reeves and Bartee were engaged. But Chief of Police Kerstein, who ultimately approved Reeves's appointment, was unaware of her personal relationship with Bartee. As such, appellant has not established any connection between Reeves's relationship with Bartee and her advancement to diminish the significance of a fellow African American's advancement in the department.

Furthermore, of the two other remaining candidates who were not assigned to the position of permanent police in March 2005, Officer Rios was not appointed to permanent police detective until 2007, and she was selected from the 2006 eligibility list

to which appellant never applied. Although Officer Foote was eventually appointed to the position of permanent police detective from the 2005 eligibility list, his appointment did not take place until January 2006. Appellant never alleged any conduct beyond the year 2005 as the basis of his discrimination claim in his first DFEH complaint. His second DFEH complaint was not filed until March 9, 2007 and could not support any claims for discrimination based on acts that occurred before March 9, 2006. As such, appellant failed to exhaust his administrative remedies as to Officer Foote's promotion.

In addition, appellant never alleged any "provisional" assignment as the basis of his discrimination claim. Appellant points out that pursuant to Education Code section 45287, a provisional appointment cannot be made while an eligibility list exists. But appellant did not plead a claim for violation of this statute and has not shown what remedies would be available to him if he had. Nowhere in either his FAC or DFEH complaints does appellant complain about provisional appointments.

Based on the issue as framed by appellant, it would appear that as a matter of law appellant cannot proceed with his discrimination claim. And even assuming that he could, there is no basis for reversal.

As to the fourth element of a prima facie case of discrimination, i.e., some other circumstance suggesting a discriminatory motive, appellant relies on five pieces of evidence, none of which satisfies this requirement. First, citing to the deposition testimony of Detective Oliver Bartee, an African American, appellant asserts that "[p]rior to August 2004, several African-American officers had complained about differential treatment at Appellant's work place. Some of these officers had resigned." Detective Bartee's actual testimony was that two individuals mentioned to him that they "were being unfairly evaluated during their FTO [training] phase." When asked if the individuals felt their treatment was based on their race, Detective Bartee testified: "They didn't tell me they felt it was based on their race. . . . [¶] . . . [¶] They did not tell me that it was because they were African American. . . . Race never entered the conversation when we were talking." Moreover, there is no evidence connecting any prior "complaints" by other employees with any decision regarding *appellant's* employment.

Anecdotal evidence of other complaints is irrelevant when involving different employees working under different supervisors in different parts of a company at different times. (See, e.g., *Wyvill v. United Companies Life Ins. Co.* (5th Cir. 2000) 212 F.3d 296, 302; *Schrand v. Federal Pacific Elec. Co.* (6th Cir. 1988) 851 F.2d 152, 156.) Indeed, appellant has made clear that this is not a "pattern and practice" case. The cited evidence does not create a reasonable inference that anyone acted with a racially discriminatory motive regarding appellant.

The same reasoning applies to appellant's second piece of evidence. Citing again to Detective Bartee's deposition testimony, appellant asserts that a "former officer, Robert Wilkins, filed a discrimination lawsuit against [the district] for failure to promote to police detective." Not only is there a lack of evidence of any connection between the Wilkins lawsuit filed in the late 1990's and decisions regarding appellant's employment, but here again, appellant ignores Detective Bartee's testimony that the Wilkins action resulted in a defense verdict for the district.

For his third piece of evidence, appellant cites to Detective Bartee's deposition testimony to prove that other African-American officers had applied for the position of detective without success and that "from 2005 through 2007, the only Black officer to be promoted to detective was Carolyn Reeves, the African-American wife of a 28-year [district] veteran detective." While a plaintiff can rely on statistical evidence to raise an inference of racial animus, appellant attempts to rely on "statistical evidence" without any actual statistics. For example, he cites only to the testimony of one employee, who was simply asked if he personally knew of other African Americans appointed to the position of detective between 2005 and 2007. Appellant provides no information about (1) how many detective positions were opened and filled during this time, (2) the racial makeup of those eligible for selection and those actually selected, and (3) the qualifications of any such candidates. Statistical evidence is of no value where the sample pool is too small. (See, e.g., *Sengupta v. Morrison-Knudsen Co., Inc*. (9th Cir. 1986) 804 F.2d 1072, 1075–1076; *Fallis v. Kerr-McGee Corp*. (10th Cir. 1991) 944 F.2d 743, 746–747.)

Fourth, appellant asserts that the district did not follow its own Rule of Three in promoting officers to detective because he was the only candidate not promoted from the 2005 eligibility list. But the evidence does not support this assertion. Officer Rios was not promoted from the 2005 eligibility list. She was promoted to detective in 2007 from the subsequent 2006 detective eligibility list, after she applied for placement on the 2006 list. Additionally, the evidence shows that the district followed its Rule of Three. The district initially selected from ranks 1 through 3. After rank 1 was exhausted, the district was free to select anyone from the remaining three ranks. The command staff did so, selecting two individuals ranked below appellant—Officer Reeves, who is African American, and Officer Foote. There was no violation of the Rule of Three, and therefore no inference of a racially-charged motive.

Appellant's last piece of evidence is essentially the same as his proffered fourth piece of evidence, namely, that the district promoted Officer Foote to detective in January 2006 without following the Rule of Three, and fails for the same reason. Moreover, appellant failed to exhaust his administrative remedies as to Officer Foote's promotion because his original DFEH charge was filed on November 28, 2005, before Foote's promotion. His second DFEH charge filed on March 9, 2007 was untimely as to Foote's promotion, and also failed to mention Foote's promotion.

Appellant failed to present evidence sufficient to create a presumption of racial discrimination. As such, the burden never shifted to the district to present evidence of legitimate, nondiscriminatory reasons for its decision not to promote appellant. But even if appellant had met his initial burden, the district met its burden as well.

B. The District's Legitimate, Nondiscriminatory Reasons

The district presented the declarations of eight command staff members who participated in the decisions to recommend other officers for the police detective positions. Each of the declarants declared that at no time during the evaluation process was appellant's race "discussed or considered." Appellant argues that such statements are inadmissible pursuant to Code of Civil Procedure section 437c, subdivision (e)

because they speak to a declarant's state of mind, lack personal knowledge and address an ultimate issue of fact. We disagree that such statements are inadmissible. The evidence showed that the command staff reviewed each candidate's personnel file and then discussed the strengths and weaknesses of each candidate during a roundtable discussion. Race was either discussed among the staff members and constituted a factor in their discussions or it was not. The declarations do not address the declarant's state of mind; rather they address the factual issue of whether race was discussed. Nor do the declarations address the ultimate issue of fact of whether there was or was not racial discrimination, but rather only whether race was discussed.

The district also presented evidence that appellant had three weaknesses in his candidacy: (1) he had a prior suspension for behavior involving stalking, (2) he had a recent absence of more than two years from active duty after taking a medical leave and then resigning, and had only been back at work for three months prior to applying for the 2005 eligibility list, and (3) he had not done anything special within the district's police department. The command staff members' declarations stated that they selected other candidates they deemed to be more qualified than appellant. The employer's reasons "need not necessarily have been wise or correct"; they need only be "facially unrelated to prohibited bias." (*Guz v. Bechtel National, Inc., supra*, 24 Cal.4th at p. 358, italics omitted.) We conclude that the district met its burden of presenting evidence of legitimate, nondiscriminatory reasons for its action.

C. Pretext

A plaintiff can prove pretext either directly—usually by evidence of remarks made by decision makers displaying bias or motive—or "the plaintiff may come forward with circumstantial evidence that tends to show that the employer's proffered motives were not the actual motives because they are inconsistent or otherwise not believable." (*Godwin v. Hunt Wesson, Inc*. (9th Cir. 1998) 150 F.3d 1217, 1222.) While direct evidence of pretext may be slight, circumstantial evidence of pretense must be "specific" and "substantial" in order to create a triable issue with respect to whether the employer

intended to discriminate. (*Ibid*.) An employee's disagreement with management's decision does not create a triable issue of fact. (*Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1005 [a factual dispute as to whether the employer's decision was wrong, imprudent or mistaken does not defeat summary judgment].) ""'While an employer's judgment or course of action may seem poor or erroneous to outsiders, the relevant question is . . . whether the given reason was a pretext for illegal discrimination. The employer's stated legitimate reason . . . does not have to be a reason that the judge or jurors would act on or approve.'"" (*Arteaga v. Brink's, Inc.* (2008) 163 Cal.App.4th 327, 344.)

Appellant did not address the issue of pretext in his written opposition to the summary judgment motion. On appeal, he simply points to the same five pieces of evidence he claims established his prima facie case. But we have already concluded that that evidence is insufficient to raise an inference of racial discrimination. Thus, we find that appellant failed to produce "specific" and "substantial" evidence to create a triable issue as to whether the district intended to discriminate. The trial court's grant of summary adjudication on appellant's claim for racial discrimination was therefore proper.

III. Retaliation

Under FEHA, it is an unlawful employment practice for an employer to retaliate against an employee for opposing any discriminatory practices forbidden by FEHA or because the employee has filed a complaint, testified, or assisted in any proceeding under FEHA. (Gov. Code, § 12940, subd. (h).) As with claims of discrimination, California has adopted the same three-stage burden-shifting analysis of *McDonnell Douglas* for claims of retaliation. (See *Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 68–70; *Iwekaogwu v. City of Los Angeles* (1999) 75 Cal.App.4th 803, 813–815.) To establish a prima facie case of retaliation, "a plaintiff must show (1) he or she engaged in a 'protected activity,' (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer's action. [Citations.]" (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36

Cal.4th 1028, 1042.) If the plaintiff establishes a prima facie case, the employer is required to offer a legitimate, nonretaliatory reason for the adverse employment action. If it does so, the presumption of retaliation disappears and the burden shifts back to the plaintiff to prove intentional retaliation. (*Ibid*.)

A. Protected Activity

Appellant argues that he engaged in protected activity in two ways: by filing an internal complaint with the district in August 2005, and by writing letters to two chiefs of police attempting to get answers for his nonselection to detective, in May, September and October 2005. Citing to numerous federal cases, the district counters that these actions do not constitute protected activity because appellant could not have reasonably believed that he was subjected to racial discrimination and that any such belief was not objectively reasonable. (See *Little v. United Technologies* (11th Cir. 1997) 103 F.3d 956, 960 ["A plaintiff must not only show that he *subjectively* (that is, in good faith) believed that his employer was engaged in unlawful employment practices, but also that his belief was *objectively* reasonable in light of the facts and record presented. It thus is not enough for a plaintiff to allege that his belief in this regard was honest and bona fide; the allegations and record must also indicate that the belief, though perhaps mistaken, was objectively reasonable"].)

The district points out the evidence showed that one of the original candidates promoted to police detective in March 2005 is the same race as appellant. The district further points out that the evidence showed that no one at the district, and certainly no decision maker, ever made derogatory or negative comments to appellant about his race, and that appellant admitted that he did not know of *any* district employee who had been discriminated against on the basis of being African American. When appellant inquired as to his nonselection, he was told that it was due to his prior suspension, extended absence and not having done anything special within the police department. In light of such evidence, the district argues that appellant engaged in no protected activity under FEHA, and that our analysis of his retaliation claim should end here. Even if we found

that appellant had engaged in protected activity, we would still find that he has not created a triable issue of fact as to his claim of retaliation.

B. Adverse Employment Action

A claim of retaliatory conduct requires adverse employment action that is "both detrimental and substantial." (*Thomas v. Department of Corrections* (2000) 77 Cal.App.4th 507, 511.) "'A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.'" (*Ibid*.) "Minor or relatively trivial adverse actions or conduct by employers or fellow employees that, from an objective perspective, are reasonably likely to do no more than anger or upset an employee cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment and are not actionable . . . ." (*Yanowitz v. L'Oreal USA, Inc., supra,* 36 Cal.4th at p. 1054.)

Appellant claims that he suffered "multiple" adverse employment actions. We disagree. First, appellant asserts that after he filed an internal complaint with the district and wrote letters to two chiefs of police, and while the 2005 eligibility list was still in effect, the district posted a new promotional opportunity for the rank of detective that "automatically robbed [appellant] of his well-deserved right to be promoted from the 2005 Promotional List." It is not clear that appellant made all of these alleged "complaints" prior to the district's posting of another promotional list. But these issues cannot be reached here because appellant did not exhaust his administrative remedies with respect to any such action. His original November 28, 2005 DFEH complaint makes no mention of retaliation or the creation of a new list. (*Cheek v. Western and Southern Life Ins. Co.* (7th Cir. 1994) 31 F.3d 497, 501: ["This means that the EEOC charge and the complaint must, at minimum, describe the *same conduct* and implicate the *same individuals*"].) And his March 9, 2007 DFEH complaint, which mentions retaliation by

the creation of a new eligibility list, was filed more than a year after the new opportunity was posted and therefore cannot form the basis of his retaliation claim.

Second, appellant complains that the district promoted Officer Foote to permanent detective in January 2006 from the 2005 eligibility list on which appellant was ranked higher than Foote. Appellant argues that the district did not follow the Rule of Three in making this promotion. We have already concluded that the evidence does not support appellant's argument and that appellant did not exhaust his administrative remedies with respect to Foote's promotion to permanent detective. As such, Officer Foote's promotion cannot form the basis of appellant's retaliation claim.

Third, appellant appears to be complaining that he was not promoted to the position of sergeant and that the Rule of Three was not followed. But there is no evidence that the rule was not followed. Appellant ignores that at the time summary judgment was granted, he was still not in a reachable rank for the position of sergeant. Thus, his failure to promote to sergeant cannot form the basis of his retaliation claim.

Finally, appellant complains that after he made his complaints known and applied for the position of senior police officer, in January 2006 the district enacted a "mysterious" policy requiring that eligible candidates who had previously served as FTOs were "must places," and that this new policy denied appellant an opportunity to be promoted because he had never been an FTO. Once again, appellant wholly ignores that he was ultimately promoted to the position of senior police officer effective November 5, 2007. To the extent appellant is complaining that he should have been promoted sooner, his retaliation claim has no viability, for the reasons discussed below.

C. Causal Link

"It is not enough that the plaintiff prove an employment decision has a substantial and detrimental effect on the terms and conditions of his or her employment. The employee also must show that the decision is linked to the employee's protected activity. For purposes of making a prima facie showing, the causal link element may be established by an inference derived from circumstantial evidence. A plaintiff can satisfy

his or her initial burden under the test by producing evidence of nothing more than the employer's knowledge that the employee engaged in protected activities and the proximity in time between the protected action and the allegedly retaliatory employment decision." (*McRae v. Department of Corrections & Rehabilitation* (2006) 142 Cal.App.4th 377, 388.)

Appellant points to the declaration of only one command staff member, Lieutenant William Tant, who stated that he was "generally aware" that appellant "had filed or submitted some sort of a complaint in connection with his not having been recommended for promotion to the Police Detective position." But appellant ignores the remainder of Tant's declaration, in which he stated that appellant's "filing of a complaint had and will have absolutely no impact upon my consideration of him for future promotions including, but not limited to, the Sr. Police Officer position." Appellant also points out that Chief Manion acknowledged appellant's complaints in a letter sent by the chief in October 2005. But appellant did not become reachable for the position of senior police officer until June 2006, and his promotion to that position became effective in November 2007. Appellant cites no authority to support a finding of "temporal proximity" under the circumstances.[3] But even if he had, the district produced legitimate, nonretaliatory reasons for its decisions.

D. Legitimate Reasons

The evidence showed that appellant's score on the senior police officer examination placed him in rank 12 on the eligibility list, with over 40 applicants ranked above him. Until ten higher ranks were exhausted, appellant was not reachable for selection under the Rule of Three. Also, under a personnel commission directive, FTOs were "must places" from the eligibility list as soon as they became reachable, and appellant had never been an FTO. The first time appellant's rank became reachable was

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[3] To the contrary, the district cites to numerous federal cases finding that much shorter time gaps fail to establish a prima facie case of retaliation.

in June 2006. Each of the other officers in this rank who were promoted to senior police officer prior to appellant were FTOs. The declarations from the command staff members showed that when considering the seven non-FTO candidates, the command staff met, reviewed and discussed the candidates' personnel files and selected the most qualified candidates. Appellant was eventually selected to the position of senior police officer in November 2007.

Because the district had legitimate, nonretaliatory reasons for its conduct, the burden shifted to appellant to produce "competent" and "substantial" evidence of pretext. (*McRae v. Department of Corrections & Rehabilitation, supra,* 142 Cal.App.4th at pp. 397–398.) Not only did appellant fail to address the issue of pretext in both his written opposition to the motion for summary judgment and in his opening brief on appeal, he has no evidence to satisfy this burden.

DISPOSITION

The summary judgment is affirmed. The district is entitled to recover its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.

DOI TODD

We concur:

_____, J.

ASHMANN-GERST

_____, J.

CHAVEZ